IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 20274 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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HEMANSU NARANDAS PATEL - Petitioner(s)

Versus

MANIBEN DHANJIBHAI GANDHI - Respondent(s)

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Appearance :

MR DHAVAL D VYAS for Petitioner(s) : 1,
None for Respondent(s) : 1, 1.2.1, 1.2.2,1.2.3

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 11/10/2005

ORAL JUDGMENT

1. Heard ld. Sr.Counsel Mr. DD Vyas with ld. Counsel Mr. Dhaval.D.Vyas for the petitioner.

2. Invoking jurisdiction of this Court under Article 227 of the Constitution of India, the petitioner

(original-defendant no.4) has challenged the order passed by ld. Civil Judge (S.D.), Navsari dated 11.02.2005 below application exh.23 in Regular Execution Petition No. 7/2003 as well as the order passed by the appellate Court in Regular Civil Appeal No.0/2005. The ld. Civil Judge, vide impugned order rejected the application exh.23 resisting the execution proceedings initiated by the original judgment creditor of Reg. Civil Suit No.259 of 1988, a suit for house rent and possession and decree passed was challenged by way of an appeal and then in a Revision Application. The proceedings had seen the Court Room of the Apex Court at one stage.

3. The ld. Sr.Counsel Mr.Vyas has taken this Court through the scheme of Rule 3 of Order 32 of CPC. It is argued that when the trial Court passed the decree, the appellant No.4 was a minor and in absence of formal order of appointment of guardian for appellant-defendant No.4,decree against defendant No.4 is a nullity and, therefore, the same can not be executed at least against defendant No.4 i.e. present petitioner. It is, therefore, argued that the Lower Court has failed in appreciating the spirit of the scheme of Rule 3 of Order 32 of CPC, especially when the law is settled by the Apex Court vide

its decision in the case of **Abdul Rahim Abdul Sidique & Another v/s Shantilal Vanechand & Company, 8 GLR 702,** wherein the Apex Court has observed thus:-

> " A minor can not be treated as if he were of full age during the investigation of any material averment in the suit. If a defendant in a suit claims to be a minor, the Court trying the suit must first satisfy itself as to his minority for if in fact he is a minor, no question arising in the suit can be decided without appointing a guardian for him. The Court must even for the purpose of holding an inquiry into the minority of the defendant appoint a guardian for the defendant."

4. Mr. Vyas has also placed reliance on the observations of the Apex Court in the case of **Ram Chandra Arya v/s Man Singh & Another, AIR 1968 SC 954,** and submitted that when a decree is found nullity, it remains nullity and subsequent decisions confirming the said decree would not make the decree good in favour of the judgment creditor and therefore, according to Mr. Vyas, the Executing Court ought to have refused to execute the decree at least against defendant No.4-

present petitioner. It is further submitted that as per record in the present case, the other co-defendants in the suit were close relatives of the present petitioner (defendant No.4) and defendant No.1 Gitaben being mother was natural guardian and the natural guardian of defendant No.4 was served with the summons, but ultimately in absence of any order of appointment of guardian when defendant No.4 was minor, would make further proceedings bad-in-law and hence the decree even passed would be nullity. These arguments were also placed before the lower Court and the same were not found acceptable by the ld. Lower Court and, therefore, the say of Mr. Vyas is that the ld. Lower Court has failed in appreciating the substantial question of law and, thereby, committed jurisdictional error. There was no scope for ld. Executing Court to take moral view merely because the petitioner- defendant No.4 has represented the case before the appellate forum and before the High Court as well as before the Apex Court.

5. It is not a matter of dispute that the judgment creditor has contested the litigation/suit on merits when the present petitioner was minor, but he gained majority before determination of the suit on merits and all

defendants had contested the suit and it is not the say of Mr. Vyas that defendant No.4-minor had remained undefended or interest of other defendants was in conflict of minor defendant No.4 Himanshu-present petitioner. All of them have contested the litigation up to Supreme Court and ultimately lost and, therefore, the successful judgment creditor filed execution petition to get the decree executed that has merged in subsequent orders and decree passed by the hierarchy of the appellate forums. The Courts of country, while appreciating the provisions of Rule 3 of Order 32 of CPC, have drawn a line of distinction between the cases where the minor are found either undefended or defended by the persons who ultimately are found either negligent or having conflict of interest with the interest of a minor. The cases where the persons appointed as guardians who were not natural guardians of the minor are also viewed from different angle, but the other view taken by the Courts including the Privy Council is that in the cases where minor is represented by the natural guardian either by mother or father and there is no conflict of interest between the minor and guardian and if the minor is found well defended in the proceedings initiated against that minor, then such infirmity in the proceedings has been

considered procedural infirmity and those decrees are not held as nullity. In support of this analogy, this court would like to refer some decisions pointed out by Mr. Vyas on the subject. I have also gone through these decisions.

(i) In the case of **Sayad Amir Saheb valad Sayad Saidumia Kadri & Others v/s Shekh Masleudin valad Gulam Mahiudin, by his guardian ad litem The Talukdari Settlement Officer of Gujarat & Others, 40 ILR (Bom) 441**, it has been observed and held that :-

> " As regards section 32 of the Act, it does not lay down any consequences of the provision not having been strictly followed and it does not follow that the decree is a nullity. Even in the case of a minor such defects have been treated as mere irregularities : *Mussammat Bibi Walian v. Banke Behari Pershad Singh ((1903) L.R.30 I.A.182)).*"

It has been further observed and held that:-

> " Then it is argued that it is bad at all events under section 32 which provides that subject to the second paragraph of section 440 of the Civil

Procedure Code, which is not material for this judgment, in every suit brought by or against a Government ward, the manager of the Government ward's property, or where there is no manager, the Court of Wards having the superintendence of the Government ward's property, shall be named as the next friend or guardian for the suit, as the case may be. But the section does not say that if the Court of Wards is not named as guardian from the commencement of a suit, the suit is bad. If it is not in every case a fatal objection to a suit against a minor that a guardian has not been named as provided by statute, then it is obvious that in certain circumstances the omission to name such a guardian during some part of the proceedings may be only a defect or irregularity in proceedings not affecting the merits of the case or the jurisdiction of the Court such as is contemplated by section 152 of the Civil Procedure Code. In that case, there would be no reason to reverse or substantially vary the decree or remand the case. In our judgment the omission in the present case in no way affects the merits of the case, and it is not suggested that the Court of Wards has any objection on the merits to the decree which has been

passed. The conclusion that the omission such as we have in this case may be treated as a mere defect or irregularity in procedure is supported by a reference to the judgments in two cases mentioned in argument, one *Rup Chand v. Dasodha* and the other *Mussammat Bibi Wilian v. Banke Behari Pershad Singh,* a decision of the Privy Council. In both those cases the provisions of section 443 of the Civil Procedure Code had not been complied with, as they should have been, but under the circumstances it was held that the non-compliance did not vitiate the proceedings. Every case, therefore, may be judged upon its own facts."

(ii) In the case of **Sadashiv Ramchandra Datar & Another v/s Trimbak Keshav Vze, 44 ILR (Bom) 202,** it has been observed and held as under:-

" I shall first deal with the point relating to the irregularity in the proceedings initiated by the present defendants on the award arising in consequence of no appointment of a guardian for the minor defendant having been made in those proceedings. It is clear that under section 443 of

the Code then in force it was incumbent upon the Court to appoint a proper person to be the guardian for the minor defendant in those proceedings which under the provisions of the Code were to be treated as a suit. All the papers connected with those proceedings are before the Court; and it is clear from those papers- and that is the conclusion reached by the lower appellate Court- that as required by section 443 no appointment of the mother or any other person as the guardian of the minor defendant was made. The question is as to the effect of this omission to appoint a guardian.When due regard is had to all the circumstances connected with these proceedings, it is difficult to avoid the inference that the minor's interests were not protected. The appearance of the mother as soon as the application for a decree in terms of the award was presented through a pleader, who is now stated by the mother to have been selected for her by the present defendant No.1, and her consenting to a decree being passed in terms of the award are circumstances of some suspicion. When we have due regard to the terms of the award, and the subsequent result of the decree, namely, a sale for an undervalue in favour of the

defendants, the conclusion of the lower appellate Court that the minor's interest had not been duly protected must be accepted. The inference is clear that the minor was not effectively represented in the proceedings initiated by the present defendants in 1901 and that the decree passed in those proceedings on the award and the subsequent proceedings in execution resulting in the sale of the property in favour of the defendant No.1 must all be treated as null and void.

It is not necessary to refer to all the decisions which have been cited in the course of the argument; but I may refer to the case of *Portab Singh v/s Bhabuti Singh* as supporting the above conclusion. The appellants have relied upon the decision in *Mussammat Bibi Walian v. Banke Behari Pershad Singh,* but the ratio decidendi seems to me to be against the appellants. Their Lordships clearly point out in that case that it is obligatory upon the Courts to comply with the provisions of section 443, and the irregularity in that case was condoned on the ground that on the particular facts, the minor was held to have been effectively represented."

Here in the instant referred decision, the minor had prayed for formal annulment of decree on the ground of serious prejudice caused to him. Causing of a serious prejudice is “Factum Probandum” and it should be either proved or has to be established from circumstances on record.

(iii)In the case of **Mustaq Ahmed Mashki v/s Mohd. Shafi Bhat and Others, AIR 1983 J & K 44,** Jammu & Kashmir High Court has observed thus:-

> (i) Provisions of Order 32 have been understandably enacted to protect the interest of the minor, who is unable to protect it himself. What the court is, therefore, enjoined upon to do is to ensure that the person whom it proposes to appoint as his guardian to defend the suit on his behalf, is capable of doing it. To achieve this object, the procedure laid down in Rr.3 and 4 provides some important safeguards, e.g. Issuing notice to the natural or certified guardian of the minor, in case there is any, who is supposed to look after his interest more than any one else can: refraining from appointing that person as a guardian, whose interest in the

subject matter of the suit is adverse to that of the minor; and obtaining the consent of the proposed guardian, as an unwilling guardian is hardly expected to deliver the goods. But, the fact still remaining that the emphasis is not as such on the devout observance of the procedure provided for the appointment of the guardian, as it is on to ensure that the proposed guardian adequately protects the interest of the minor. Therefore, so long as it can be safely said that the guardian has done all that he could do to protect his interest, the decision given in the suit against the minor will not be open to question on the mere ground that the procedure prescribed for the appointment of the guardian was not adhered to. This is further borne out from Sec.99 of the Code which says that no decree shall be reversed or substantially varied in appeal on account of any error, defect or irregularity in any proceedings in the suit which does not affect the merits of the case, or the jurisdiction of the Court. This section thus makes a clear distinction between the inherent lack of jurisdiction of the court and its irregular exercise by it.”

It has been further observed as under:-

" A similar view was taken by a Division Bench of the Patna High Court in *Ramchandra Pd. Singh v. Rampunit Singh, AIR 1968 Pat 12.* These decisions no doubt support the contention of Mr. S.L.Kaul, but with utmost respect to the learned Judges who constituted the aforesaid two benches. I find it difficult to agree with them. Irrespective of the fact whether sub-rules (3) & (4) are mandatory or merely directory in character, the fact remains that these are rules of procedure and are always subject to the provisions of Sec.99. The decree passed in violation of these sub-rules shall not be open to question except on proof of prejudice. Sec.578 of the Code of 1882 controlled not only the procedural provisions that existed in the Code when it came to be enacted, but would have controlled all such provisions which would be included in the Code even thereafter. The distinction drawn in the aforesaid two bench decisions was therefore clearly unreal."

5(a) In all cases where the party-defendant is a minor and if represented by a natural guardian, then

representation of such a party-defendant minor by itself would not become totally ineffective. Duty of the natural guardian served with the summons on behalf of minor, if is not interested in defending the minor, or wishes to have some special order with a view to protect the interest of a minor defendant, then such a guardian served with a notice or summons, should return summons saying that it is wrongly or improperly served or at least should draw the attention of the Court in this regard or should seek clarification as to the nature of obligation that he is supposed to discharge. If the interest of the natural guardian is in conflict with the minor, then such a natural guardian may or may no point out contingency before the Court. In such a fact situation, it is obligatory on the part of the plaintiff to disclose the aspect of direct or indirect conflict of interest between minor defendant and the guardian served with the notice or summons in the suit. The fact as to the age of minor in such cases also should be treated as relevant because the minor having capacity to understand seriousness or sensitivity of the court proceedings, on attaining majority pending proceedings, i continues with the litigation supporting the stand taken by his natural guardian or with natural guardian if such a guardian is

also one of the party-defendant, then decree passed even against the minor can not be treated as a decree in nullity.

(b) It is true that as per settled legal position, it is mandatory for the Court to appoint guardian for minor defendant, but in absence of such a specific order, the suit proceedings concluded in above facts situation are voidable. In the present case, the petitioner defendant attained majority even pending litigation and he himself had filed an appeal before the competent court. The battle continued up to the Apex Court and even the Apex Court was not requested by that very defendant that decree drawn against him is irregular and voidable and so at least judgment and decree drawn against him be quashed. It is true that in execution proceedings, legal resistance can be placed, but things that the petitioner intend to place before the executing court can be said to have been resolved indirectly during subsequent proceedings that have taken place in furtherance of the suit proceedings. Regular Civil Appeal is nothing but a continuation of a suit. So, it can legitimately be inferred that the petitioner himself had taken the thread of the suit against him in his own hand and tried to

resist the plea of the plaintiff up to the highest court of the country. Even after confirmation of decree finally by the Apex Court, the petitioner had not even cared to initiate separate proceedings. So, the nature of resistance placed before the executing Court posing decree as a nullity, would not sustain. The decree which is otherwise voidable, needs a particular decision from a competent court and unless such a decree is declared void by a judicial pronouncement, it is binding to the persons against whom the same is drawn. In a given set of facts, a party should not be permitted to encash its own wrong or condemnable conduct.

6. The observations and discussion made by the lower Court is that the litigation was contested by all the defendants including the present petitioner and he was represented by his elder members of his family who were also defendants in the said suit. Mr. Ieyasu has fairly accepted that format of memo of First Appeal preferred, contains name of the present petitioner and on that day, he was major. So, he is aware about the litigation and no formal attempt was made by him to get the decree set aside being nullity till the termination of the proceedings before the Apex Court which took number of

years. So, this Court is not in agreement with the say of Mr. Ieyasu that in absence of any formal order of appointment of a guardian for minor defendant No.4 seamanship- present petitioner, the decree remains nullity and can not be executed against the present petitioner. On the contrary, it appears that the defense taken by the petitioner is nothing but an after-thought and application exh.23 appears to have been filed to protract the litigation and to stall the execution proceedings filed after a long lapse of time. This court is of the view that in such an eventuality, the decree can not be held as nullity or in executable and is binding to the defendants including present petitioner -original defendant No.4 who continued with the litigation and consciously entered into dispute till the same is redressed by the Apex Court.

7. For the reasons aforesaid, there is no merits in the present petition and the same is hereby dismissed. No costs.

(C.K. BUCH, J)

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